Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 08–353–05 OF 2013(W)
ARIFIN ZAKARIA CHIEF JUSTICE, RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDULL HAMID EMBONG, HASAN LAH AND APANDI ALI FCJJ
6 FEBRUARY 2014

Civil Procedure — Appeal — Leave to appeal — Official receiver's sanction not obtained before company applied for leave to appeal to Federal Court — Whether sanction subsequently given by official receiver retrospectively validated leave application — Whether doctrine of ratification applied to make good filing of application — Whether applicant failed to move court for grant of leave nunc pro tunc

The applicant herein was wound up on 4 February 2010 and on the same day the official receiver was appointed as its liquidator. Without obtaining the prior sanction of the official receiver the applicant applied for leave to appeal to the Federal Court on 23 May 2013. The official receiver gave his sanction only on 19 August 2013. The respondent applied for the leave application to be struck out contending that it was void ab initioas the applicant did not have locus standito file the application.The respondent said the official receiver's sanction could not operate retrospectively to validate the filing of the application. The applicant, inter alia, argued that under the doctrine of ratification the fact that the official receiver had given his sanction cured any defect relating to locus standi.

Held, allowing the respondent's application with costs:

(1) The sanction given in the Director-General of Insolvency's letter dated 19 August 2013 did not specify that it was to be retrospective. For the doctrine of ratification to apply, the ratification must be clear (see para 20).

(2) There was no application for the official receiver's sanction to be made retrospective. In short, there was no *nunc pro tunc* cleave application. There was, therefore, no material before the court to consider and to justify the grant of *nunc pro tunc* cleave (see para 23).

(3) The argument that the respondent had not been prejudiced and that no miscarriage of justice had been caused did not arise as the applicant, on its own accord, failed to utilise the enabling provisions of the law to commence the legal proceedings. The court, in law, was not in a position to render assistance to such a litigant (see paras 15 & 21).

[Bahasa Malaysia summary

Permohonan di sini telah digulung pada 4 Februari 2010 dan pada hari yang sama pegawai penerima dilantik sebagai likuidator. Tanpa memperolehi sanksi sebelumnya terhadap pegawai penerima pemohon memohon untuk izin merayu kepada Mahkamah Persekutuan pada 23 Mei 2013. Pegawai penerima memberikan sanksinya hanya pada 19 Ogos 2013. Responden memohon untuk izin permohonan untuk dibatalkan berhujah bahawa ia adalah *void ab initio* memandangkan pemohon tidak mempunyai locus standi untuk memfailkan permohonan ini. Responden menyatakan sanksi pegawai penerima tidak dapat beroperasi secara retrospektif untuk mengesahkan pemfailan permohonan tersebut. Pemohon, antara lain, berhujah bahawa di bawah doktrin ratifikasi fakta bahawa pegawai penerima telah memberikan sanksinya mengatasi apa-apa kecacatan berkaitan locus standi.

Diputuskan, membenarkan permohonan responden dengan kos:

(1) Sanksi yang diberikan di dalam surat Ketua Pengarah Insolvensi bertarikh 19 Ogos 2013 tidak menyatakan yang ia adalah sebagai retrospektif. Untuk doktrin ratifikasi diguna pakai, ratifikasi mesti jelas (lihat perenggan 20).

(2) Tiada permohonan untuk sanksi pegawai penerima untuk dibuat retrospektif. Secara ringkas, tidak terdapat permohonan izin *nunc pro tunc*. Oleh itu, tidak terdapat material di hadapan mahkamah untuk mempertimbangkan dan untuk menjustifikasikan pemberian izin *nunc pro tunc* (lihat perenggan 23).

(3) Penghujahan bahawa responden tidak diprejudis dan bahawa tidak terdapat ketidakadilan disebabkan tidak berbangkit memandangkan pemohon, dengan sendirinya, gagal untuk menggunakan peruntukan undang-undang yang membolehkan untuk memulakan prosiding undang-undang. Mahkamah, dari segi undang-undang, bukan dalam kedudukan untuk memberikan bantuan kepada litigan sedemikian (lihat perenggan 15 & 21).]

Notes

For cases on leave to appeal, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1293–1357.

Cases referred to

Alexander Ward and Co Ltd v Samyang Navigation Co Ltd [1975] 2 All ER 424, HL (refd)

Danish Mercantile Co Ltd and others v Beaumont and another [1951] 1 Ch 680, CA (refd)

Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd [2013] 1 MLJ 406; [2012] 10 CLJ 88, CA (refd)

Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputera (M) Bhd [2002] 1 MLJ 385, FC (refd)

Saunders (a bankrupt); Re Bearman (a bankrupt), Re [1997] Ch 60; [1997] 3 All ER 992, Ch D (refd)

Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd) [2010] 2 MLJ 749; [2010] 3 CLJ 785, FC (refd)

Legislation referred to

Bankruptcy Act 1967 s 38(1)(a)

Companies Act 1965 ss 226(3), 236(2)(a), (3)

Appeal from: Civil Appeal No W-02–1192 of 2011 (Court of Appeal, Putrajaya)

HL Lee (HL Lee & Co) for the applicant.

Wong Hin Loong (Gan Chwee Yen with him) (Azman Davidson & Co) for the respondent.

Apandi Ali FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is a motion taken by the respondent vide encl 8(a) namely to strike out the application for leave to appeal, by the applicant. It is basically a preliminary objection to the application for leave to appeal.

[2] The only issue raised by the respondent was that applicant filed the application for leave (encl 2(a)) without any leave from the official receiver (as liquidator of the applicant) and as such the applicant had no locus standi and consequently the leave application (encl 2(a)) was invalid and should be struck out.

SALIENT FACTS

[3] The salient facts relevant to this application are as follows:

(a) the applicant was wound up on 4 February 2010. The official receiver was appointed as the liquidator of the applicant pursuant to the winding up order on 4 February 2010;

(b) The applicant applied for leave to appeal to this court on 23 May 2013. This was done without obtaining any sanction from the official receiver;

(c) on 19 August 2013 the applicant obtained sanction from the official receiver. As can be seen from the above chronology of events, the

applicant obtained the sanction from the official receiver after the filing of the application for leave to appeal to this court.

THE ISSUE BEFORE THIS COURT

[4] The issue is whether the sanction by the official receiver dated 19 August 2013 have a retrospective effect, hence validating the application for leave which was filed prior to the issuance of the sanction.

ARGUMENTS BEFORE THIS COURT

By the respondent

[5] In support of its contention, the respondent submitted that this issue came for consideration of the Court of Appeal in the recent case of *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd* [2013] 1 MLJ 406; [2012] 10 CLJ 88, where at pp 14–15 (MLJ); at pp 92–93 (CLJ) Ramly Ali JCA (as His Lordship then was) held:

> An action filed by the appellant without any leave from the official assignee (as liquidator) or the court or filed by the appellant without having any locus standi to do so in law is clearly illegal and invalid.
>
> There are no provisions of law to authorise that leave or sanction of the official assignee is to have retrospective effect. The appellant lacks locus standi right from the time when the action was filed. Therefore the action was invalid and void ab initio. Subsequent leave or approval by the official assignee office which came more than two years later cannot legalise or validate an action which was invalid and void ab initio.

[6] *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd* went before the Federal Court for leave. Leave was refused. The two issues raised by the appellant in that particular case were:

(a) whether leave of court was required pursuant to s 226(3) of the Companies Act 1965 for a wound up company to commence and/or continue with a legal proceeding; and

(b) whether sanction granted pursuant to s 236(2)(a) of the Companies Act 1965 to institute, continue or defend a legal proceeding had retrospective effect.

[7] On 19 September 2013 after hearing submission from both parties, this court dismissed with costs the application for leave to appeal.

[8] The respondent went on to submit that although the applicant in this case had relied on two English cases namely *Danish Mercantile Co Ltd and others v Beaumont and another* [1951] 1 Ch 680 and also *Alexander Ward and Co Ltd v Samyang Navigation Co Ltd* [1975] 2 All ER 424 the facts in those cases were distinguishable from the present case simply because, in the case before this court:

(a) the applicant was wound up on 4 February 2010;

(b) the applicant's application for leave to appeal to the Federal Court was filed on 23 May 2013; and

(c) the applicant only obtained the sanction from the official receiver to file the application for leave to appeal to the Federal Court on 19 August 2013.

[9] The respondent argued that the applicant was incompetent to file the leave application in the first place since it had been wound up in the year 2010. It is settled law that once a limited company is wound up, its assets and liabilities vest with the liquidator appointed and it is up to him to decide whether to institute, continue the prosecution of, or defend legal proceedings on behalf of the wound up company. To back his argument on this issue the respondent then cross-referred to sub-s 236(2) of the Companies Act 1965; on powers of liquidator, which reads as follows:

> (2) The liquidator may
>
> (a) bring or defend any action or other legal proceeding in the name and on behalf of the company;.

and also two other cases namely *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749 ; [2010] 3 CLJ 785, at pp 795–796 and *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd* [2013] 1 MLJ 406; [2012] 10 CLJ 88.

[10] The respondent therefore prayed that the application for leave to appeal by the applicant be struck out with costs on the premise it is invalid and void ab initio.

By the applicant

[11] The applicant, on the other hand, questioned whether such consent is really necessary. It refers to s 38(1)(a) of the Bankruptcy Act 1967 (Act 360), which it read as follows:

> (1) Where a bankrupt has not obtained his discharge
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an

action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency; A

[12] The applicant further argued that it was not the question of sanction but rather the prerogative of the liquidator to bring any action in the name of the company. In this connection he referred to s 236(2)(a) of the Companies Act which reads: B

(2) The liquidator may

(a) bring or defend any action or other legal proceeding in the name and on behalf of the company; C

[13] At this juncture as well, the applicant also argued that the respondent is actually challenging the lawyer's authority to act in this proceeding rather than the issue of lack of sanction. D

[14] The applicant highlighted the issue of prerogative of the liquidator as clearly expounded by Justice Zaki Tun Azmi and Justice Gopal Sri Ram in *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd* [2010] 2 MLJ 749. In dismissing the appeal, it was held by: E

Per Zaki Tun Azmi CJ:

An appointment of an advocate by a liquidator pursuant to s 236(2)(a) of the Companies Act does not require leave of the court because he clearly needs the services of an advocate to bring or defend a legal action. Only the appointment under s 236(1)(e) requires the leave of the court and that is when he needs an advocate to assist him in his 'ordinary administrative and management duties of a liquidator such as those that are within his ordinary professional competence to borrow the words of Abdul Aziz J. I do not need to quote the full text from his judgment as my learned brother Gopal Sri Ram FCJ has done so). F G

Per Gopal Sri Ram FCJ:

… once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. However, there is jurisdiction in the Court to authorise other persons to conduct litigation in the name of the company… the court's power to authorise someone other than the liquidator to institute, continue or defend proceedings only arises where the liquidator refuses to do so and declines authority. But where, as here, the liquidator grants authorisation, there is no necessity to move the court. H I

…

Since a director — or more appropriately a former director — of a company in liquidation is not a party to the liquidation a court will not authorise him or her to launch or to continue proceedings or indeed to defend them. A fortiori the

liquidator has no power to confer such authority, since he cannot do what the court will not do on his default. It follows that Khaidzir bin Hj Ishak ought not to have been authorised to continue with the proceedings. It may well have been different if Khaidzir bin Hj Ishak had also been a creditor or a contributory.

In short, a liquidator who wishes to appoint an advocate and solicitor to prosecute, continue or defend an action by or against the company in liquidation may do so under s 236(2)(a) without the leave of the court or the committee of inspection.

[15] Corollary to that, the applicant also submitted that the respondent had not been prejudiced in any way and no miscarriage of justice has occurred (see *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputera (M) Bhd* [2002] 1 MLJ 385.)

OUR ANALYSIS

[16] From the submissions and arguments before us, it is clear that in making this application, the respondent is relying on the provisions of the Companies Act 1965, while on the other hand, the applicant is relying on the provision of the Bankruptcy Act 1967. It is an obvious and undisputed fact that the applicant is a corporate person incorporated under the Companies Act. That being so, it is axiomatic that the applicant cannot be a person under the Bankruptcy Act.

[17] The applicant did not forward any argument as to why despite it being a corporate body the provision of the Bankruptcy Act is applicable for purposes of the pre-requisite sanction before filing any action in court. At the most, the argument was based on analogy. It is our judgment that an analogy argument will have weight if it is based on similar facts and similar legal positions but not otherwise.

[18] When a specific law has been enacted pertaining to any power or right relating to legal proceedings, that specific law shall prevail over any other similar laws. It is our judgment that for purposes of this application the relevant law applicable is the Companies Act 1965.

[19] As such, we find no reason to depart from the decision of the Court of Appeal in *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd* [2013] 1 MLJ 406; [2012] 10 CLJ 88, which this court refused leave to appeal on 19 September 2013. To recapitulate, in the above case, inter alia, it was held that:

(i) The sanction granted under s 236(2)(a) of the Companies Act 1965 to bring, defend any action or other legal proceedings in the name or on behalf of the company does not have a retrospective effect.

[20] It was also argued by the applicant that by applying the doctrine of ratification, a subsequent sanction could ratify the issue of locus standi. To see if such doctrine is applicable in this case, it is appropriate to see the actual 'sanction' given. The sanction as per the Director General of Insolvency's letter dated 19 August 2013, did not specify that it is to be retrospective. For the doctrine of ratification to be applicable, the ratification must be clear. Furthermore, in the present case, there is no evidence to show that there is ever any application for the sanction to be retrospective. In *Re Saunders (A bankrupt); Re Bearman (A bankrupt)* [1997] Ch 60; [1997] 3 All ER 992 Lindsay J, held:

> Given the practical inconveniences I have described and the injustices that can be left without possible remedy if retrospective leave is in no case possible, I share with the Full Bench in Lahore in 1942 the view that, if the section is capable of being read more than one way, there is no doubt which way entails the less injustice and inconvenience. If, as I hold, the words used are in their full historical context fairly capable of bearing more than one meaning, it is legitimate for me to adopt a meaning which gives effect to the statutory purpose, rather than frustrating it, as in my view an inflexible powerlessness to give leave even in the most glaring of cases would do:
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> … Accordingly, I hold that leave may in appropriate circumstances be given under section 285(3), notwithstanding that the proceedings in question have already been commenced.
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> …
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> As for the discretion, I have earlier mentioned that the trustees in bankruptcy do not oppose the granting of leave and that it has been conceded that if the jurisdiction exists the facts are such as to justify a grant of leave *nunc pro tunc* in exercise of the discretion. I am satisfied that that is so and grant such leave.

[21] The issue of prejudice or miscarriage of justice does not arise in the circumstances, as the applicant, on its own accord, had failed to utilise the enabling provisions of the law to commence the impugned legal proceedings. The court, in law, is not in a position to render assistance to such litigant.

[22] Following *Saunders*' case, we hold the view that in appropriate circumstances, which has to be proven, leave *nunc pro tunc* may be given under s 236(2)(a) of the Companies Act subject to the discretion of the courts under s 236(3) of the Act. Such discretion and control by the court under s 236(3) is to be read together with s 226(3) of the Act. This is notwithstanding the fact that the proceedings had already commenced.

[23] As stated earlier in this case there was no application for the sanction to be made retrospectively. In short, there was no *nunc pro tunc* leave application. As such there is therefore no material before this court to consider and to justify a grant of a *nunc pro tunc* leave.

[24] For the above reasons, we allow the application in encl 8(a), with costs.

Respondent's application allowed with costs.

Reported by Ashok Kumar